No. 88-5060

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DANIEL HOLLAND,

Petitioner,

v.

ILLINOIS,

Respondent.

On Writ Of Certiorari To
The Supreme Court Of Illinois

REPLY BRIEF FOR PETITIONER

RANDOLPH N. STONE
Public Defender of Cook County
ALISON EDWARDS
RONALD P. ALWIN
DONALD S. HONCHELL*
Assistant Public Defenders
200 W. Adams St.
4th Floor
Chicago, Illinois 60606
(312) 609-2040
Counsel for Petitioner
**Counsel of Record*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

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1. Throughout its brief, the State has persistently condemned petitioner's use of the Sixth Amendment right to trial by impartial jury as providing the right to a fair possibility his petit jury will include a representative cross-section of the community so as to bar the State's racial misuse of peremptory challenges to exclude blacks from jury service. The State disapproves of commingling Sixth Amendment rights with Fourteenth Amendment equal protection concerns and would erect an impenetrable wall between them and thereby strictly segregate these related constitutional provisions. Such an effort at isolation is both unnecessary and unrealistic and should be rejected. There are, indeed, as petitioner demonstrated in his opening brief, equal protection benefits from the recognition of the Sixth Amendment right being advocated here and it is foolish to ignore them, on the State's demand, since required by the separate purposes of the rights to trial by jury and equal protection. In fact, petitioner's argument the Sixth Amendment guarantees, under the provision assuring right to trial by impartial jury, the fair possibility that jury is comprised of a community cross-section is well supported by cases and commentators. It should be recognized without the distress suggested by the State as its major disagreement with petitioner's argument.

The State's primary dispute with petitioner's assertion the Sixth Amendment entitles him to the fair possibility his petit jury will include the representative community cross-section is the claim he commingles Sixth Amendment and equal protection concepts. To the State, the Sixth Amendment simply assures an "impartial" set of jurors while the Fourteenth Amendment equal protection provision governs the race discrimination alleged present here. Therefore, since *Batson* v. *Kentucky*, 476 U.S. 79 (1986) provides the exclusive remedy for the equal protection error claimed here, petitioner must adhere to that decision. Of course, being white, petitioner cannot utilize that holding and, so, in essence can do nothing. This inability to apply *Batson* to his own case, by the very terms of the *Batson* decision, disposes of the State's assertion (Br., p. 15) that this Court need not consider the Sixth Amendment approach since a remedy is already available.

In asserting the Sixth Amendment jury trial right, petitioner relies on a guarantee clearly applicable to him. As the State bemoans (Br., pp. 38-40), the Sixth Amendment right to trial by jury applies to every citizen accused of a crime and each is entitled to contend it was not provided in his case. In the case such as here of racial discrimination which serves to deny defendant his constitutional right to a jury trial, there is necessarily some unavoidable spillover of equal protection and Sixth Amendment considerations. In this regard, one commentator sensibly explained this relationship as follows:

> "Clearly, an overlap in the goals achieved by application of the fair cross-section requirement and equal protection analysis exists in the context of jury selection. Both requirements help maintain the general integrity of the judicial system. Both requirements help avoid discrimination against groups

> whose members are prevented from undertaking jury service. But while stopping discrimination directed at groups is the primary goal of applying equal protection analysis, it is only a secondary goal in applying the fair cross-section requirement. The primary rationale for the fair cross-section requirement is not that it protects members of groups but that it protects any individual defendant's right to a fair and impartial jury. The sixth amendment is concerned primarily with the rights of the defendant, not with the rights of those in the group excluded from jury service." (Magid, *Challenges to Jury Composition: Purging the Sixth Amendment Analysis of Equal Protection Concepts*, 24 San Diego L. Rev. 1081, 1112-13 (1987) (hereafter *Challenges*))

Likewise, the connection between these two constitutional sections was equally well summarized in this fashion:

> "Originally, the goal of a jury of one's peers found support in the equal protection clause and its command to eliminate intentional racial discrimination. By the 1970s, however, the *Strauder* [v. *West Virginia*] goal had become the benefactor of a completely different constitutional provision—the sixth amendment right to trial by jury and its essential component, the right to have a jury selected from a fair cross-section of the community. As the Court moved away from the equal protection analysis, the fair cross-section requirement evolved into the sole source of protection for the defendant's interest in a jury of peers. Not until *Batson* did the Court revitalize the concept of reaching the goal of a jury of peers by means of the equal protection clause." (Serr & Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. Crim.L.&Criminology 1, 6-7 (1988) (hereafter *Jurisprudence*))

Thus, both constitutional provisions do share an interest in racial discrimination, with the difference arising in the

degree of that concern. While banning racial discrimination is the "essential" purpose of the equal protection clause, it is a secondary (though worthy) objective of the Sixth Amendment. Instead, "the chief goal of the fair cross-section requirement remains the protection of every defendant, not the protection of only particular groups." (*Challenges*, 24 San Diego L. Rev. at 1114) The benefits to the war against racial bigotry from acknowledgment of the Sixth Amendment right advocated here are considerable. The "recognition of the fair cross-section requirement as applicable to petit juries would combat such discrimination" and "would broaden the anti-discriminatory effect of the *Batson* decision." (Raphael, *Discriminatory Jury Selection: Lower Court Implementation of Batson* v. *Kentucky*, 25 Willamette L. Rev. 293, 348, 294 (1989) (hereafter *Selection*)) But the constitutional assurance on which petitioner relies is the Sixth Amendment right to trial by jury because "only the sixth amendment's fair cross-section analysis and not equal protection analysis can fully protect a defendant's sixth amendment right to a" trial by jury. (Magid, *Challenges*, 24 San Diego L. Rev. 1081 at 1083)

The State insists the *Batson* case is the sole means of combating discrimination, although it admits this holding "is not available to petitioner". (Br. at p. 13) What it doubts is whether discrimination against blacks ever arises in trials of white defendants where the prosecution removes black prospective jurors through use of peremptory challenges and, so, whether this Court should consider using the Sixth Amendment to combat it. (Br., p. 13) In fact, this Court recognized in *Batson*, 476 U.S. 79 at 97 that prosecutors act on the "assumption that blacks as a group are unqualified to serve as jurors" (apart from the assumption of bias "simply because the defendant is

black"). This bias could thus operate in trials of white defendants.

In truth, contrary to State beliefs, "the elimination of blacks from juries is not limited to . . . black defendants" (Doyel, *In Search of a Remedy for the Racially Discriminatory Use of Peremptory Challenges*, 38 Okla.L.Rev. 385, 386 (1985) (hereafter *Search*)) and "[i]nnumerable 'practice manuals' reveal that prosecutors—at least those who accept the conventional cluckings of courthouse corridors—seek to avoid minority jurors whatever the race of the defendant." (Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U.Chi.L.Rev. 153, 187 (Winter 1989) (hereafter *Supreme Court and Jury*)) This Court cannot be "oblivious to the possibility that prosecutors might systematically exclude blacks in cases involving white . . . defendants" (*Supreme Court and Jury*, 56 U.Chi.L.Rev. at 186-7) but must recognize the clear collateral value of fighting remaining vestiges of racial bigotry by applying the Sixth Amendment as argued by petitioner herein and in his opening brief.

Contrary to the State's additional contentions, there is simply more to the Sixth Amendment trial guarantee than impartial jurors.

2. Another State complaint arises from its assumption petitioner is only assured of a right to impartial jurors under the Sixth Amendment and since he offers no complaint his jury was partial, there was no Sixth Amendment violation by the State's use of peremptory challenges on the basis of race to remove all blacks from jury service. Petitioner asserts the State misreads the Sixth Amendment much too narrowly since it assures him jury rights beyond the mere guarantee of impartial jurors

as construed by the State. Furthermore, imposing impartiality in the selection process leading to the trial jury, which the State disapproves (Br., p. 45), also protects valued Sixth Amendment interests and should be endorsed by this Court.

The very fact this Court considered and established the rights to a fair cross-section of the community included in the jury selection process prior to trial (*Taylor* v. *Louisiana*, 419 U.S. 522 (1975); *Duren* v. *Missouri*, 439 U.S. 357 (1979)) and to the fair possibility the petit jury includes representatives of the community (*Ballew* v. *Georgia*, 435 U.S. 223 (1978); *Williams* v. *Florida*, 399 U.S. 78 (1970)) indicates the Sixth Amendment provides for more than a collection of impartial jurors. Were impartiality alone all the Sixth Amendment guaranteed, no basis exists for this Court's holdings on including women in the jury pools and assuring the jury size permitted a representative community cross-section. While the State maintains (Br., p. 28) the "jury size cases" did not extend the concept of a fair cross-section to the petit jury, it has been recognized that, in *Ballew*, "the Court indicated that the fair cross-section applies to the petit jury when it held that a five-person petit jury was unconstitutional because it was too small to represent the community accurately." (Magid, *Challenges*, 24 San Diego L. Rev. 1081, 1089) Assuming impartiality, a jury of four men chosen from a system excluding women could seemingly comprise a constitutional jury in the State's view.

The trial jury must not only be impartial or indifferent as the State reveals (Br., p. 47) but, as the State equally concedes (Br., p. 22), selected from a venire constituting a fair cross-section of the community. The State fails to explain how a system which merely demands indifference to achieve the sole goal of impartiality also demands a

representative cross-section of the community in the jury pool. The very insistence on this cross-section as conceded by the State belies its claim the Sixth Amendment is satisfied merely by indifference. The mere existence of cases such as *Taylor* and *Duren* and *Williams* and *Ballew* demonstrates the fallacy of the State's belief the Sixth Amendment requires indifferent jurors but nothing more. Analysis of the Sixth Amendment right to trial by jury likewise clearly supports the petitioner's assertion he is constitutionally entitled to the fair possibility of a representative cross-section on the panel in his case.

The fundamental nature of the jury trial right secured by the Sixth Amendment was cogently expressed by this Court in *Taylor* v. *Louisiana:*

> "The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." (*Taylor*, 419 U.S. 522 at 530)

By this evaluation, this Court has proclaimed there is more to a jury than the impartiality of its members. For, this Court "has found that the fair cross-section requirement helps achieve the purpose of the jury, which is to 'guard against the exercise of arbitrary power' by making 'available the commonsense judgment of the community.'" (Magid, *Challenges*, 24 San Diego L. Rev. 1081, 1111) Moreover, in his analysis of this view of the jury, Professor Doyel related the 7-Justice majority in *Taylor* determined

> "the purpose of a jury is to guard against the arbitrary exercise of power by an overzealous or mistaken prosecutor. The jury accomplishes this purpose, [Justice] White said, by 'mak[ing] available

> the commonsense judgment of the community.' But the community's judgment is not provided by a jury from which a large, distinctive group has been excluded." (*Search*, 38 Okla. L. Rev. 385, 418))

Thus, the guarantee asserted by petitioner that he possessed the right to the fair possibility for including cognizable community groups in his petit jury is directly related to the heart of the Sixth Amendment jury protection. This Court has certainly "long recognized that the fair cross-section requirement is an essential component of the right to a representative jury" so that if "groups can be excluded arbitrarily from juries, the legitimacy of the jury system is undermined." (Magid, *Challenges*, 24 San Diego L. Rev. 1081 at 1114, 1112) Petitioner's argument that removal of the black prospective jurors here by State misuse of peremptory challenges on racial grounds is thus based squarely on the Sixth Amendment's jury trial right, a right which extends beyond the mere limits of impartiality of the jurors.

While the State refers to the discussion of impartiality in *Lockhart* v. *McCree*, 476 U.S. 162 (1986) (Br., p. 47), this Court there never reduced the Sixth Amendment to mere impartiality but, instead, analyzed the meaning of the constitutional right to impartial jurors. As petitioner offers no argument the jurors were partial in violation of the Sixth Amendment, this Court need not valuate the application of *Lockhart* to this case. Instead, it should analyze whether in removing by peremptory challenge all blacks called for jury service the State has disrupted petitioner's Sixth Amendment right to the fair possibility he would obtain a jury comprising a fair cross-section of the community and, thereby, has frustrated the underlying purposes of a trial by jury.

It should likewise accept impartiality as significant in the selection of that jury. It has been recognized that

when this Court extended the Sixth Amendment right to trial by jury to States, it "focused not on fundamental rights but fundamental *processes*." (Druff, *The Cross-Section Requirement and Jury Impartiality*, 73 Cal. L. Rev. 1555, 1580 (1985) (hereafter *Cross-Section*); emphasis by the author) It is thus only sensible this Court insist on an impartial process of jury selection so that, in this sense, a procedure that allows a prosecutor to exclude all black venire-persons without any reason for the exclusion other than race appearing in the record does not comport with the Sixth Amendment impartiality requirement.

Petitioner maintains this fair possibility right does indeed exist under the Sixth Amendment and appears violated here so as to require a hearing on the issue.

3. The State also quarrels with the various cases petitioner has presented which support his argument the State violated his Sixth Amendment right to trial by jury by removing all blacks by peremptory challenge and frustrating the fair possibility his petit jury would contain a representative cross-section of the community. (Br., pp. 13-15) The main complaints raised by the State relate to the cases arising prior to *Batson* and using a mixture of the jury trial and equal protection right simply as a means to overcome *Swain*. The fact some of the cases appeared before *Batson* was decided is irrelevant. Other cases have been decided since *Batson* and have, as petitioner advocated, utilized the Sixth Amendment to find constitutional error in the State's racial use of peremptory challenges to strike blacks from the jury. (*Seubert* v. *State*, 749 S.W.2d 585 (Tex. App. 1988); *State* v. *Superior Court*, 157 Ariz. 541, 760 P.2d 541 (1988); *Fields* v. *People*, 732 P.2d 1145 (Colo. 1987)) Despite its general claim, the State makes no particularized reference to any portion of

any decision which improperly mixes jury trial and equal protection considerations (which, as noted herein, are somewhat related anyway). And as to the motives for the decisions, they were well-summarized in the following form:

> "Most of the courts that have applied the fair cross-section analysis to the petit jury indicated that they were doing so for the two reasons: (1) because a defendant's sixth amendment rights were being violated and (2) because equal protection analysis, especially when the systematic exclusion requirement of *Swain* was applied, would not protect the defendant." (Magid, *Challenges*, 24 San Diego L. Rev. 1081 at 1094)

Thus, apart from circumventing *Swain* (even assuming that be a defect which the State has not explained), the cases were motivated by violations of the Sixth Amendment. Given this and the soundness of the Sixth Amendment analysis in the decisions, the State's criticism is unpersuasive. It acknowledges the cases did use the Sixth Amendment (Br., p. 14, 14 n. 1) and, in fact, "[n]early all of the cases relied at least in part upon United States Supreme Court decisions incorporating a representative cross-section-of-the-community analysis into the sixth amendment guaranty of trial by impartial jury." (Doyel, *Search*, 38 Okla.L. Rev. 385, 417) Therefore, they continue to provide encouragement to this Court to utilize, as advocated, the Sixth Amendment to find unconstitutional the misuse of the State peremptory challenges to destroy the fair possibility of a representative cross-section of the community on the petit jury.

4. The State questions the petitioner's acceptance of the mere "possibility" his jury reflects the community consensus (Br., p. 30 n. 3) and notes the only sure way to achieve a cross-sectional requirement "is to have a cross-

section actually present on each petit jury." (Br. at p. 32) It equally complains of the problems it faces if it must ensure the venire represents the community so that the petit jury represents the community (Br. at p. 34) and it charges "petitioner's Sixth Amendment approach" with mandating inclusion of blacks on a jury. (Br., p. 48) It flatly supposes that, accepting petitioner's argument, the Sixth Amendment commands empanelled juries "actually mirror the composition of the community." (Br., p. 28) These criticisms misperceive the nature of the rights and procedures involved in the jury selection system under the Sixth Amendment.

Although the State chides petitioner for seeking too little (just a fair possibility of the community cross-section on the petit jury rather than a guarantee), it equally notes, as petitioner recognized, petitioner has no constitutional right to place community groups on his trial jury. (Br., p. 32) It is certainly nonsensical for petitioner to seek that to which he is not entitled.

However, inclusion is constitutionally mandated but at the appropriate time. Under accepted procedural arrangements, all community segments are included in the jury pool listings. Therefore, at that time, there is indeed the affirmative burden on the State authorities to place community groups on the jury rolls. That jury list thus must reflect the full cross-section of cognizable groups in that society. Under the constitution as interpreted by this Court, the State may not deliberately evade its responsibility to include the representative community cross-section on these lists. This Court thereby assures that, at the outset, the jury pools of the local government will reflect that community's cross-section. Thereafter, the system's random selection of potential jurors for the venire creates the continued fairness essen-

tial to its existence. Citizens have at least the assurance of the fair possibility members of cognizable groups on the jury pool will reach the jury venire. By this case, this Court should insist the citizens have the same assurance of the fair possibility members of particular groups in society on the jury venire reach the only crucial body in the whole selection process—the petit jury itself. Petitioner seeks in the selection of his trial jury the same insulation from wrongful official interference which now governs the selection of the venire.

There is normally no opportunity for impermissible disruption in selecting the venire as that occurs totally at random. Since the petit jury is not chosen at random but through voir dire, there is the potential for State misconduct in its improper removal of potential jurors otherwise available for jury service. That misconduct (racial misuse of peremptory challenges) is the maleficence to be condemned and outlawed here. No community groups must be on the venire but the random selection process assures the fair possibility they might be. No representative community group must be on the petit jury but the ban on misapplied State peremptory challenges assures they might be. Not only is such a demand reasonable, it is necessary. The State's concerns on including group members by some affirmative quota system are thus baseless and need not be regarded.

Contrary to State accusation (Br., p. 19), petitioner does not seek "to alter the system protected by the Sixth Amendment". Rather, he seeks to assure to all citizens trial by a system as required by the constitution and intended by this Court. This is done by recognizing (1) the initial affirmative burden to include without exception all community groups on the jury rolls, (2) the random selection thereafter of potential jurors on the venire (assuring

thereby the fair possibility members of cognizable groups will be included), and (3) the restriction on improper exclusion of members of those distinctive groups in the voir dire process so as to, again, assure the fair possibility they will eventually serve on the petit jury. This is the system guaranteed by the Sixth Amendment (not the current flawed one endorsed by the State, (Br., p. 48)) There is no radical alteration as the State assumes (Br., pp. 48-9) In fact, this Court need only conclude, as petitioner has argued, that the Sixth Amendment bars the prosecutor's racial use of peremptory challenges to remove blacks from the jury and thereby destroy the fair possibility blacks will participate as petit jurors. In this way, as the State seeks, the constitutional command is made operational and, therefore, fully enforceable (Br., p. 29) and the Sixth Amendment principles followed consistently to their logical conclusion. (Br., p. 19)

5. The State further expresses concern on the groups in question whose removal by peremptory challenge would permit the complaint of Sixth Amendment violation, perhaps to raise fears of the consequences of this case. (Br., pp. 24-5, 25-6) The State simply does not believe (Br., p. 25) the principled approach to this issue can be limited to the facts here presented: removal of blacks from the jury in the trial of a white defendant. Regardless of the State's imagined extension of a holding in this case in petitioner's favor, this Court need only decide the question arising from these facts: the State's removal for racial reasons of black prospective jurors from a white defendant's trial jury frustrates the fair possibility a representative cross-section of the society will be included on that jury to express the community's commonsense judgment.

If, in the future in another case in another court in another context, another defendant wishes to apply this

law, he will have the burden of proving the group excluded and, so, unrepresented is a cognizable one in that community. (In any event, this Court has seemed willing to permit a flexible and fluid application of the law since, as recognized by the State (Br., p. 24), it noted in *Taylor* v. *Louisiana*, 419 U.S. 522 at 537 that communities differ so that a fair cross-section in one locale and time might not dictate another community's fair cross-section requirements.) This case involves the recognized cognizable group of blacks so that, as in *Lockhart*, 476 U.S. 162 at 174, there is no necessity to now define the distinctive groups about whose peremptory removal a defendant may complain.

6. The State also complains petitioner "says nothing about whether defendant is constrained" in his use of peremptory challenges during voir dire (Br., p. 40) and dwells on the prosecutor's possible ability to complain under the Sixth Amendment of the defense counsel's misuse of peremptory challenges. (Br., pp. 40-2) Whether this is some tacit endorsement of applying the Sixth Amendment to ban racial misuse of peremptories by prosecutors so prosecutors can object themselves is not made clear. But the simple explanation for petitioner's silence on this matter is its absence as an issue in this case. No complaint was made in the trial court by the State nor did it raise as an issue on appeal the defense counsel's racial misuse of his peremptory challenges to exclude black potential jurors. (Defense counsel in fact did not exclude any black prospective jurors in this case.) Thus, there is no record here on which to determine the need to apply the Sixth Amendment ban on racially-motivated peremptory challenges to defense attorneys.

In any event, the State offers little concrete authority for its assumption constitutional symmetry is mandated

by the Sixth Amendment. (It does not argue the equal protection clause of the Fourteenth Amendment provides it any grounds to object to defense peremptory challenges and this Court therefore has been given no basis to utilize that constitutional provision to restrict defense peremptories.) The assumption of symmetry has been challenged recently by analysts as an inadequate constitutional reason to limit the exercise of peremptory challenges by defense attorneys.

Professor Katharine Goldwasser, in her article in the Harvard Law Review, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 Harv.L.Rev. 808, 825 (1989) reports, with citations, that

> "A few courts have considered—and have uniformly rejected—the argument that principles of fairness require symmetrical treatment of the opposing parties in a criminal case.
>
> * * *
>
> "No one would argue against fairness to both sides in a criminal trial. But any argument that our criminal justice system equates fairness with symmetry would be equally untenable."

Upon analysis (102 Harv.L.Rev. at 826-40), Professor Goldwasser concluded "prosecution and defense peremptories ought to be treated differently" (102 Harv.L.Rev. at 826) and, since "imposing *Batson*-like limitations on defendants would, in fact, jeopardize the fairness of criminal trials, defense peremptories should be left alone." (102 Harv.L.Rev. 808, 840)

Similarly, Professor Susan Bandes explored the concept of State's rights in *Taking Some Rights Too Seriously: The State's Right to a Fair Trial*, 60 So.Cal.L.Rev. 1019 (1987). In doing so, she considered

and rejected "the assumption that the state also possesses trial-related rights which are equal in weight to those of the accused." (60 So.Cal.L.Rev. at 1019) She noted distortions from "the incorrect assumptions that the state must be treated equally with the accused" (60 So.Cal.L.Rev. 1019 at 1056), stressing the "Constitution makes no mention of the state's right to a fair or impartial trial." (60 So.Cal.L.Rev. at 1022-3) Thus, the true purpose of the Sixth Amendment right to trial by jury is not to aid the State but (as with other sections of the federal Bill of Rights) "to redress the inherent imbalance between the 'awesome power' of the state and the unprotected position of the individual accused of crime." (60 So.Cal.L.Rev. at 1025; emphasis removed) This same inability of the State to rely on Sixth Amendment trial rights to diminish defense peremptories appears elsewhere in current legal literature (see Note, *Defendant's Discriminatory Use of the Peremptory Challenge After Batson* v. *Kentucky*, 62 St. John's L. Rev. 46, 59-60, 66 (1987); Comment, *The Prosecutor's Right to Object to a Defendant's Abuse of Peremptory Challenges*, 93 Dick.L.Rev. 143, 153 (1988)) and this Court should not now so utilize the Sixth Amendment to create such a State right, especially considering the lack of authority for it offered by the State in its brief. If anything, as the above law review note and comment recognize (93 Dick.L.Rev. 143, 152; 62 St. John's L. Rev. 46 at 66), any restrictions on defense peremptories cannot be imposed by courts on constitutional grounds of Sixth Amendment symmetry but should be limited to statutory provisions enacted by local legislatures.

Accepting petitioner's contention the Sixth Amendment assures him the State will not frustrate his jury trial right to the fair possibility of a representative community cross-section on his petit jury does not compel extending

this right to the State, at least not in this case. This record lacks both the factual and legal challenges appropriate for resolving the issue of the State's Sixth Amendment rights. Therefore, this Court should simply determine the petitioner's Sixth Amendment rights (not those of the State) and find him entitled to a ban on the State's interference through its peremptory challenges with the fair possibility of blacks, a cognizable community group intended to convey the commonsense judgment of the local society, on his petit jury.

ARGUMENT

II. THE REMEDY: CONTRARY TO STATE ASSERTIONS, THE CONSTITUTIONAL ERROR OF DEPRIVING PETITIONER OF HIS SIXTH AMENDMENT RIGHT TO THE FAIR POSSIBILITY OF A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY ON HIS PETIT JURY IS DETERMINED ACCORDING TO THE STANDARDS OF *BATSON* v. *KENTUCKY* RATHER THAN *DUREN* v. *MISSOURI*

1. Petitioner maintained in his opening brief that, since the State misconduct at issue here occurred during selection of his trial jury, the standards of *Batson* v. *Kentucky*, 476 U.S. 79 (1986) would be appropriate. The State responds (arguing on the absence of the right advocated here) that the proper criteria are reflected in *Duren* v. *Missouri*, 439 U.S. 357 (1979), unmet here, and questions why this "conventional Sixth Amendment standard" is inapplicable. (Br., pp. 30, 32, 35) In fact, its applicability is limited (as was the factual situation in *Duren*) to pretrial stages of jury selection and it has no sensible function during voir dire.

The perspective on this point was presented in *Cross-Section*, 73 Cal.L.Rev. 1555, where it was recognized the "elements of a prima facie violation *in the early stages* of

selection were detailed in *Duren*". (73 Cal.L.Rev. 1555, 1561; emphasis added) Thus, the *Duren* analysis has no appropriate place in the later, trial, stage of jury selection. The two stages (pre-trial and voir dire) are distinguishable and, therefore, so are the appropriate standards for judging a violation.

It was emphasized in *Cross-Section* that this Court in *Duren* required "that the selection of veniremembers must be *random* so that the pattern of venires over time will be representative." (73 Cal.L.Rev. 1555 at 1568; emphasis by author) However, since "[b]oth counsel and the court exercise a necessary element of discretion in the process of striking veniremembers", "the standard for the earlier stages of selection, with its emphasis on randomness, cannot apply" to voir dire. (73 Cal.L.Rev. 1555, 1566) The "inappropriateness of applying" *Duren* to the voir dire process arises "from the fact that peremptory challenges are presumably nonrandom." (73 Cal.L.Rev. at 1568) This is certainly a persuasive reason for restricting *Duren* to its facts of determining error in pretrial jury proceedings.

In this regard, the reviewing court in *McCray* v. *Abrams*, 750 F.2d 1113, 1131 (2nd Cir. 1984) succinctly concluded it was "evident that the second factor stated by the *Duren* Court, *i.e.*, that the resulting group was in fact not representative of the community, is not applicable to the petit jury stage." That is truly the situation and, since the evaluation of the exclusion of jurors during pre-trial selection procedures significantly differs from the evaluation of exclusion during voir dire, the standards sensibly differ as well. The State has failed to justify application of pre-trial standards (in *Duren*) to the selection of the petit jury and, therefore, use of *Duren* here (either to reject the right or provide the remedy) should be refused.

Rather, because "[t]he fair cross-section analysis is somewhat different when used to limit peremptory challenges at the petit jury level", the defendant would simply need to "show that a substantial likelihood exists that the challenges leading to the exclusion of a group were made on the basis of group affiliation rather than because of an individual's possible inability to fairly decide the case." (Magid, *Challenges*, 24 San Diego L. Rev. 1081 at 1088-9) Since intended by this Court to permit a meaningful analysis of the question of whether the State misused its peremptory challenges to remove black prospective jurors during voir dire, it is appropriate to utilize the *Batson* standards to evaluate Sixth Amendment trial violations. It is criteria with which trial courts are familiar, can be easily used in trials with both black and white defendants, and even the State admits *Batson* "can be usefully applied in the context of a single trial". (Br. at p. 34) Upon recognizing the Sixth Amendment right here proposed of a ban on State interference with the fair possibility a representative community cross-section expressing commonsense judgment will appear on a petit jury, this Court should sensibly conclude the appropriate standards for evaluating any violation of this right are the voir dire criteria of *Batson* v. *Kentucky*.

2. The State complains, based on *Duren*, of hardships in withholding consideration of the challenged State jury selection misconduct until the close of voir dire. (Br., pp. 35-6) Since, as noted herein, *Duren* is not the controlling case on appropriate trial court procedures, there is no concern as assumed by the State. Rather, the parties and trial court will proceed as intended by this Court in *Batson*, a system already deemed appropriate for review of misused peremptory challenges.

Even should a judge, however, delay consideration of the matter to the end of voir dire, that has been viewed as

"the best time for the trial judge to properly address the issue" and "the most logical and judicially economical time" since only then will the trial judge "have before him the necessary information on which to base the prima facie determination." Seer & Maney, *Jurisprudence*, 79 J.Crim.L.&Criminology 1 at 20, 21 n 114) Trial courts remain free to apply the standards sensibly under the circumstances of the particular case and there is no need to credit the State's unwarranted alarm here. Instead, this Court should simply declare, as petitioner argued in his opening brief, the *Batson* remedy is a suitable procedure for evaluating claimed Sixth Amendment constitutional error in the State's misuse of its peremptory challenges.

CONCLUSION

Wherefore, petitioner respectfully requests, for the reasons asserted herein, this Honorable Court reject the contentions of the State and, as argued in his opening brief, order a hearing on the State's unconstitutional use of its peremptory challenges.

Respectfully submitted,

RANDOLPH N. STONE
Public Defender of Cook County
ALISON EDWARDS
RONALD P. ALWIN
DONALD S. HONCHELL*
Assistant Public Defenders
200 W. Adams St.
4th Floor
Chicago, Illinois 60606
(312) 609-2040
Counsel for Petitioner
**Counsel of Record*

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